SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-540

LOUIS CRAMER and MINNIE K. CRAMER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

Respondent recognizes petitioners' right to access to the grand jury testimony of a witness under the force of this Court's opinion in *Dennis* v. *United States*, 384 U.S. 855 (1966), and the opinion of the Second Circuit in *United States* v. *Youngblood*, 379 F. 2d 365 (1967), but asserts that that right is extinguished when the grand

jury testimony is not recorded. Reduced to its barest terms, respondent argues that petitioners' right to the grand jury testimony of an important trial witness depends upon the prosecutor who may or may not see fit to record it; if he does not, argues the respondent, the right to the grand jury minutes vanishes. In any event, further argues respondent, the petition for a writ should be denied because petitioners were not prejudiced and the prosecutor won't do it any more.

To maintain that petitioners' access to the grand jury testimony can be dispensed with through a procedural gimmick depending upon the whim or self-indulgent policy of a prosecutor, is the first place to support a result which thwarts and frustrates a clearly defined policy laid down by this Court.

The dissenting opinion of Circuit Judge Oakes gives further answer to the respondent, it is respectfully submitted. Judge Oakes says the principle laid down by this Court in *Dennis* v. *United States* that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact," 384 U.S. at 873, which was the reason why the defendant was entitled to examine the grand jury testimony of trial witnesses, can easily be evaded where "the prosecutor not only has exclusive access to the storehouse, but by failure to record the testimony he has thrown away the keys." (App. to Pet. for Cert. p. 26a).

What Circuit Court Judge Oakes says in addition is worth repeating as a further answer to respondent:

> "The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subse-

quent statements including these admissions as Jencks Act materials.* But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury. Particularly where, as here, we are dealing with the customary federal agent who types up a report from original notes and then destroys the notes and testifies from his report, it is essential that a defendant be given every opportunity to determine whether, at least, the agent has been consistent with his own prior testimony.

"But there is a second, perhaps more cogent reason for requiring grand jury testimony to be recorded, entirely independent of the first. The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations, accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime. In today's case it is the commercial crime of tax evasion; in tomorrow's it may be incitement to riot, conspiracy to murder, or something equally seri-

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* The prejudice which the petitioners in fact suffered are set forth in petitioners' petition for rehearing and hearing *in banc* to the Court below (at pp. 6-7). There set forth are the inconsistencies between Special Agent Sager's memorandum which he used to testify as an "aide memoir", and his report, the inconsistencies between his "reports" and his testimony, his claimed memory of events not found in his "reports", and his admitted false statement to the grand jury.

> ous. It is no answer to say that the grand jury hands down only indictments, and not convictions. For today, as to serious crimes, with crowded courts and crowded jails, a defendant who may subsequently be acquitted or have the charges against him dismissed, may spend a year or two or three in custody awaiting trial. See *United States ex rel. Frizer* v. *McMann*, 437 F. 2d 1312 (2d Cir. 1971) (en banc). If he is fortunate enough to be a so-called 'political' defendant, he may arouse sympathy and be able to advance his cause in jail or raise a large amount of bail. But if he is a typical criminal in a typical American jail, he hasn't any money, he may get only an automatic defense, he may be punished before he's even tried.
>
> *"The failure to record a witness's testimony goes to the very integrity of the grand jury process. It also has consequential effects which are many and substantial."* (App. A to Pet. for Cert. pp. 26a-28a) (emphasis added).

To the same effect see the opinion of Judge Pettine in *United States* v. *Gramolini*, 301 F.Supp, 39, 41-42 (D.C. R.I. 1967) set out in the petition at pp. 14-15.

As to the last contention by respondent that this petition for certiorari should be denied because the prosecutor in the Northern District has promised to record grand jury testimony from now on, what Circuit Judges Oakes stated is most apt:

> "While the United States Attorney stated at oral argument that it is now the policy in the Northern District of New York to record all grand jury proceedings, his statement is no assurance that the next United States Attorney will not revert to the old policy." (App. A to the Pet. for Cert. p. 25a, n.1).

II.

With respect to petitioners' second point, respondent argues that petitioners failed to object to the trial court's instruction and have in effect waived it. Respondent is correct when it recites (p. 4 n.3) that counsel for petitioners at the trial withdrew his statement to the trial court that he thought the court had used the word "must" instead of "may", but respondent is incorrect in interpreting this colloquy between trial counsel and the court as being a withdrawal of the objection to the substance of the charge given with respect to the inferences to be drawn from the mere signing of a tax return. The same counsel, in advising the court that he was mistaken in believing the court had said that the jury "must" draw the inferences, objected to any rereading of the charge as given, but instead requested specifically that the court charge the submitted instruction on this question, Request No. 37 (A. 2157a). The court further said, "that has been denied two or three times." Even prior to this interchange, counsel for petitioners had taken an exception to the court's refusal to charge Request No. 37 (A 2155a-2157a). Petitioner's Request No. 37, which recited the principle in *Lurding* v. *United States,* 179 F.2d 419 (6th Cir. 1950), and which petitioners submit is the proper rule, is completely contrary to the instruction given by the trial court on the inferences to be drawn from the mere signing of a return. Petitioners submitted this principle as the correct principle of law, which the court disagreed with, denied, and refused to instruct. The court, thus, was sufficiently alerted to the objection which petitioners had to any instruction given by the court which was contrary to that reflected in the submitted instruction, Request No. 37. *Wright,* Federal Practice and Procedure, Sec. 484, and cases cited. It cannot thus be said that counsel's failure

to specifically object to the manner in which the Court charged on that issue was a waiver of their right to raise this before this Court where it is abundantly clear that the trial court was well aware of petitioners' disagreement with the instruction he intended to give and did in fact give, which was contrary to requested instruction 37. See, for example, *Leary* v. *United States,* 395 U.S. 6, 32, 89 S. Ct. 1532, 1546 (1969); *United States* v. *O'Connor,* 237 F.2d 466, 471-472 (2d Cir. 1956).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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THALER & THALER,
Counsel for Petitioners.

December 9, 1971.